STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 25, 2006
v	No. 258287 Oakland Circuit Court
W. C. MORRIS, Defendant-Appellant.	LC No. 2003-191666-FH

Before: Fort Hood, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of 50 or more but less than 450 grams of cocaine, MCL 333.7403(2)(a)(iii). The trial court, applying a second-offense habitual offender enhancement under MCL 769.10, sentenced him to 13-1/2 to 30 years' imprisonment. Defendant appeals as of right. We affirm.

I

Defendant's conviction arises from the seizure of cocaine from a house on May 21, 2003, during the execution of a search warrant by law enforcement officers assigned to the Oakland County Narcotics Enforcement Team. At trial, defendant did not dispute that cocaine was found in the house but claimed that there was no credible evidence to connect him to the cocaine.

According to law enforcement officers who participated in the search, defendant was on the front porch of the house when the search warrant was executed. Defendant's mother, wife, and other family members were also present at the house. They were handcuffed and secured. Law enforcement officers photographed and seized various items commonly associated with drug trafficking, such as scales and packaging materials, which were found in the kitchen. Eleven small packages of cocaine were found inside a stereo speaker in an upstairs bedroom. Defendant's name or nickname "Dub" was on a key chain, driver's license, and correspondence found in the bedroom. Farmington Hills Police Detective Kevin Cronin interviewed defendant after the cocaine was discovered. Defendant admitted that the cocaine, scales, and other items in the house belonged to him. Defendant also wrote a statement in which he admitted that the "cocaine in the bedroom was mine. I got it earlier today, fronted by a guy named Scott. I owe two thousand dollars for it, and I was going to sell it for about twenty-eight hundred."

Defendant testified that he resided at the house at the time of the search, but that it was his mother's house. He denied knowledge of the cocaine, but admitted writing a statement in which he stated that the cocaine belonged to him. Defendant claimed that he wrote the statement because a police officer threatened to arrest everyone in the house and he did not want his mother to go to jail. Defendant claimed that, later, after being offered a plea "deal," he told a probation officer that he possessed the cocaine because he believed that he had to give a statement consistent with his earlier statement so that no one else would be charged.

II

On appeal, defendant challenges the trial court's pretrial ruling denying his motion to suppress his statements to Detective Cronin. Defendant claims that the trial court clearly erred in finding that he voluntarily waived his *Miranda*[1] rights. We disagree.

We review a trial court's factual findings at a suppression hearing for clear error but give deference to the trial court's assessment of the weight of the evidence and credibility of the witnesses. *People v Shipley*, 256 Mich App 367, 372-373; 662 NW2d 856 (2003). Whether *Miranda* rights were voluntarily waived depends on the absence of police coercion. *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152 (2000). Although we engage in an independent review of the record, we will not disturb the trial court's decision unless we are left with a definite and firm conviction that a mistake was made. *People v Sexton (On Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). The totality of the circumstances surrounding the making of the statement are considered to determine if it was voluntarily made. *Daoud, supra* at 633-634; *Sexton, supra* at 752.

In the case at bar, there was conflicting testimony concerning the circumstances surrounding the making of defendant's statements. Detective Cronin testified that defendant "basically begg[ed]" to speak with him after another officer indicated that drugs were found in the house. Further testimony indicated that defendant was advised of his *Miranda* rights, acknowledged that he understood his rights, and signed a waiver of rights form. Defendant, by contrast, testified that he was told that the only way he could prevent his mother, his wife, and others from being arrested was to admit that the drugs belonged to him. He claimed that he would not have made the statements but for the police threats. He also claimed that he was not advised of his *Miranda* rights.

A threat to arrest a member of a suspect's family may cause a confession to be involuntary. *United States v Finch*, 998 F2d 349, 356 (CA 6, 1993). Here, however, it is clear from the trial court's decision that it found Detective Cronin's testimony credible. The court gave weight to Detective Cronin's testimony that defendant begged to talk to him in finding that defendant's statement was voluntary.

Giving deference to the trial court's assessment of Detective Cronin's credibility, we are not left with a definite and firm conviction that the trial court erred in finding that defendant's

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

statements were voluntary. Although the atmosphere may have been stressful in the sense that law enforcement officers were executing a search warrant, the totality of the circumstances do not establish that defendant's statements were coerced from him by law enforcement officers.

III

Defendant next argues that the evidence was insufficient to establish that he possessed the cocaine found in the stereo speaker. We note that although defendant moved for a directed verdict at trial, he failed to specify any basis for the motion. In any event, we find no error in the trial court's denial of the motion.

"We review de novo challenges to the sufficiency of the evidence in criminal trials to determine whether, viewed in a light most favorable to the prosecutor, a rational trier of fact could have found all the elements of the charged crime to have been proven beyond a reasonable doubt." *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). The credibility and weight of the evidence is for the trier of fact to decide. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Possession of a controlled substance may be actual or constructive. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002); *Wolfe, supra* at 520. It may be joint with more than one person, and may be found even when a defendant does not own the controlled substance. *Wolfe, supra* at 520. Constructive possession may be established by evidence that a defendant has a right to exercise control over the controlled substance and knew that it was present. *Id.* However, a person's mere presence at a location where the controlled substance was found is insufficient to prove constructive possession. *Id.*; *People v Griffin*, 235 Mich App 27, 34; 597 NW2d 176 (1999).

Viewed in the light most favorable to the prosecutor, defendant's own statements were sufficient to establish that defendant owned the cocaine (having purchased it on credit from a "guy named Scott"), knew of its presence, and had a right to control it. The evidence that a driver's license and other items belonging to defendant were found in the bedroom where the cocaine was found further linked defendant to the cocaine. The evidence was sufficient for the jury to find beyond a reasonable doubt that defendant had constructive possession of the cocaine.

IV

Defendant next claims that the prosecutor engaged in misconduct during closing argument by remarking to the jury, with respect to defendant's testimony, "*I submit that you should say shame on you for blaming your mom. Well, it's mom's house, it's mom's house, it was mom's house*. And when pushed on that, he said, well, I'm not blaming my mom" (emphasis added).

We examine the prosecutor's remarks in context to determine if defendant was denied a fair and impartial trial. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). Because defendant did not object to the prosecutor's remarks, we review this unpreserved claim of prosecutorial misconduct under the plain error standard from *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). See *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370

(2000), abrogated on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Under the plain error doctrine, the threshold issue is whether defendant can establish an error that is plain, meaning "clear or obvious." *Carines, supra* at 763. Examined in context, it is not apparent that the prosecutor misstated defendant's testimony in closing argument. The prosecutor made the challenged remarks in the context of arguing that defendant's testimony that he did not know who the cocaine belonged to was not credible. The prosecutor argued that defendant's testimony was inconsistent with his prior statements to the police and a probation officer.

Also, the prosecutor's argument acknowledged defendant's testimony in which he denied blaming his mother. The prosecutor's preceding remark that defendant blamed his mother was made in reference to defendant's repeated testimony that the house in which the cocaine was found belonged to his mother. In fact, on direct examination by defense counsel, when asked, "[w]hose drugs were in the house, do you believe?," defendant answered, "[m]y mom's got a boyfriend. And I don't know. But I mean, it's my mom's house, you know."

A prosecutor is free to argue the evidence and all reasonable inferences arising from the evidence. *Schutte, supra* at 721. Therefore, we find no basis for holding that the prosecutor plainly misstated the evidence. Further, while a prosecutor should avoid denigrating a defendant with intemperate or prejudicial remarks, the prosecutor's admonishment to the jury that it should find defendant's conduct shameful was not so inflammatory as to deprive defendant of a fair trial. See *People v Bahoda*, 448 Mich 261, 272, 283; 531 NW2d 659 (1995). Moreover, absent a timely objection, we are satisfied that any prejudice was dispelled by the trial court's instructions to the jury that it "must not let sympathy or prejudice influence your decision" and "[t]he lawyers' statements and arguments are not evidence." *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001); *Schutte, supra* at 721-722.

We reject defendant's alternative claim that defense counsel's failure to object to the alleged misconduct constituted ineffective assistance of counsel. To establish such a claim, a defendant must show that counsel's performance fell below an objective standard of reasonableness and must also show prejudice. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must overcome a strong presumption that counsel's action was sound trial strategy and, with respect to prejudice, demonstrate a reasonable probability that, but for counsel's error or errors, the result of the trial would have been different. *Id.* at 302-303. Further, the result of the trial must have been fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Because defendant did not move for a new trial or evidentiary hearing in the trial court, our review is limited to mistakes apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999).

As already indicated, the record does not support defendant's claim that the prosecutor misstated evidence. To the extent that the prosecutor's remarks were objectionable, defense counsel might reasonably have elected to avoid highlighting the matter with an objection, as a matter of strategy. In any event, defendant was not prejudiced by defense counsel's failure to object. Hence, his claim of ineffective assistance of counsel cannot succeed.

V

Defendant next argues that the destruction of potentially exculpatory, physical evidence deprived him of due process. The failure of law enforcement officers to preserve potentially useful evidence does not constitute a denial of due process unless a defendant shows bad faith. *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988); *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993).

Here, the prosecutor informed the trial court at the beginning of trial that the cocaine and other items seized from the house during the execution of the search warrant were destroyed by law enforcement personnel pursuant to policy after defendant tendered a plea under *People v Cobbs*, 443 Mich 276; 505 NW3d 208 (1993), during an earlier trial. Based on defense counsel's response, "I can't argue bad faith," we hold that defendant waived any claim that the evidence was destroyed in bad faith. Unlike a forfeited issue arising from the failure to object, a waiver extinguishes any error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000).

We reject defendant's alternative claim that defense counsel was ineffective by not moving for dismissal or requesting an adverse inference instruction based on the destruction of the evidence. Limiting our review to mistakes apparent from the record, *Rodriguez, supra* at 38; *Rockey, supra* at 77, it is not apparent that defense counsel's performance was deficient because there is no record evidence of bad faith. Contrary to defendant's argument on appeal, gross negligence is not equivalent to bad faith. See, e.g., *United States v Garza*, 435 F3d 73, 75-76 (CA 1, 2006). A defendant must show an improper motive. *Id.* Further, an adverse inference instruction is only appropriate if there was bad faith. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Defense counsel does not render ineffective assistance by failing to take an action that would be futile. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

VI

Finally, defendant argues that the trial court erred by failing to suppress evidence obtained under the search warrant following an evidentiary hearing pursuant to *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978). In reviewing a magistrate's decision to authorize a search warrant, a reviewing court need only ask if a reasonably cautious person could have concluded that a substantial basis exists for probable cause. *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). There must be a substantial basis for the magistrate's conclusion that a fair probability exists that contraband or evidence of a crime will be found in a particular place. *Id.* at 604.

Under *Franks, supra*, a search warrant must be quashed and the fruits of the search suppressed at trial if a defendant shows by a preponderance of the evidence that the affiant knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause. *People v Chandler*, 211 Mich App 604, 612; 536 NW2d 799 (1995), vacated on other grounds as noted in *People v Edgett*, 220 Mich App 686; 560 NW2d 360 1996). "[W]here the affidavit includes sufficient untainted information to establish probable cause apart from the misinformation, the affidavit, and resulting search warrant, remain valid within the scope and to the extent of the untainted information." *Griffin, supra* at 42.

At best, defendant established a factual question regarding the accuracy of Detective Cronin's averment that defendant sold cocaine to an informant by testifying at the evidentiary hearing that he had a visitor on the day in question but did not sell him anything. However, Detective Cronin's testimony, if believed, established that the cocaine transaction occurred as part of a controlled buy in which the informant was searched before going to the house to purchase cocaine, the informant was given funds to make the purchase, and a surveillance team was used to confirm the informant's entry into the house and to follow the informant back to a predetermined location, where the informant was found to have cocaine and approximately $10 remaining from the funds provided. Detective Cronin further testified that the informant had provided him with reliable information in the past.

Although Detective Cronin did not appear at the evidentiary hearing with any physical evidence to corroborate his testimony, we give deference to a trial court's superior opportunity to assess the credibility of the witnesses. *Shipley, supra* at 373. Giving the appropriate deference in the case at bar, we find no clear error in the trial court's determination that defendant did not meet his burden of proof. Defendant did not establish that Detective Cronin knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit.

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Patrick M. Meter